SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 635

ROBERT VINCENT GARDNER,

Appellant,

—v.—

VINCENT L. BRODERICK, as Police Commissioner of the City of New York, and THE CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S REPLY BRIEF

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Appellant's refusal to waive immunity was justified at the Departmental Hearing by the evidence introduced; the Appellees contemplated use of compelled testimony in criminal proceedings; equal protection of the laws was urged below; the state requirements of continued public office are unconstitutional.

The "Question Presented for Review" as set forth in the Appellees' Brief on page 2 contains two unwarranted assumptions. The first is that the Appellant failed to offer any explanation of his refusal to waive immunity; the second is that at the time and place of this case it was the Appellees' presumption that the testimony adduced could not

and would not be used against Appellant in subsequent criminal proceedings. Appellant did offer explanation of his refusal to waive immunity. He stated at the Grand Jury hearing that since he was a target of the investigation there was no authority to question him (A21). This explanation was in evidence when the District Attorney at the Disciplinary Hearing testified and paraphrased Appellant's explanation, and the minutes of the Grand Jury Hearing were also introduced by the prosecution into evidence (A29). This reason was reasserted by Appellant's Counsel in his motion to dismiss, stating that Appellant's appearance before the Grand Jury was illegal and all consequences flowing therefrom were similarly illegal, in that there was no authority on the Part of the Grand Jury to subpoena and examine a target of investigation, citing *People* v. *Steuding*, 6 N. Y. 2d 214, 160 N. E. 2d 468 (A32). At his Disciplinary Hearing the Appellant did not refuse to testify since he was not requested to by the prosecution. His justification for refusal to waive immunity was an adequate one already in evidence before the Commissioner, and this reason, together with the fact that the requirements of the statutes under review are unconstitutional and fall of their own weight, satisfied Appellant's defense needs. Thus the statement on page 5 of appellees' brief under the heading "Appellant's Case" that Appellant did not offer any evidence on his behalf or offer any explanation of his refusal to sign a waiver of immunity, is incorrect. The two paragraphs above that statement in Appellees' Brief set forth Appellant's explanation. The fact that Appellant chose to rest on the Department's case and not testify was consistent with the statutes and cases cited in Appellant's brief which hold that he was not required to do so.

The assumption that under the circumstances of the case the evidence adduced at the Grand Jury hearing could not and would not have been used against him in subsequent criminal proceedings is without merit. The proceedings took place before *Garrity* v. *New Jersey,* 385 U. S. 493. The investigation was not an administrative disciplinary hearing but an announced criminal investigation (A20). The intention to use the information gained therein in a criminal prosecution is sustained by that announced purpose of the hearing, together with the wording of the proposed waiver of immunity (Appellees' Brief, Appendix p. 23), and the fact that the statutes pursuant to which Appellant was requested to sign the waiver are cast in terms of and contemplate criminal prosecution. In fact it was not until the Court of Appeals decision in this case that any suggestion by anyone was made that there was never any real purpose other than administrative use of the testimony. Article I, Section 6 of the *New York Constitution* contains the proviso excepting public officers, which proviso by its terms is specifically attached to the privilege against self-incrimination in any criminal case. If this section is being relied upon as justification for Appellant's dismissal and it is assumed by Appellees that the Grand Jury investigation was not a criminal case, then the proviso requirement to waive immunity would not apply under the terms of the Article as written. The proviso relates only to criminal cases.

The Appellees in their Brief mostly rely on cases which antedate *Malloy* v. *Hogan,* 378 U. S. 1, and which were decided at a time when it was believed that the Fifth Amend-

ment of the *United States Constitution* did not apply to the states through the Fourteenth. They cite footnote "3" to Mr. Justice Douglas' opinion in *Spevack* v. *Klein,* 385 U. S. 551,516, and the concurring opinion of Mr. Justice Fortas at 385 U. S. 551, 519, both of which refer to failure to testify at disciplinary hearings. Reliance on these observations is not well placed for two reasons: The refusal to testify in this case was not at a Disciplinary hearing by the Department but rather at a Criminal hearing by a Grand Jury without power to discipline; and the refusal of a public officer to testify at his own removal hearing is authorized by statute and case law of New York cited in Appellant's Brief. *Laws 1940,* Ch. 834; *Civil Service Law* §75; *Schawecker* v. *Green,* 96 App. Div. 249, 89 N. Y. S. 343.

Appellees' suggestion on page 20 of their brief that the issue of Equal Protection of the Laws and illegal appearance before the Grand Jury was not before the New York Courts or this Court is without merit. The Petition, equivalent to a complaint and hence a pleading, in paragraph "Sixth" alleged that Appellant's dismissal was a denial of equal protection of the Laws (A4). The Answer and Return served by Appellees set forth the basis of the dismissal, including the exhibits setting forth the Grand Jury Appearances and the Departmental hearing, wherein the illegal appearance was alleged (A21, A28, A29, A32). The Reply of Appellant alleged the dismissal was contrary to the Constitution of the United States. Thus the equal protection of the laws issue was raised in the pleadings which frame the issues. These pleadings were before all courts below and the issue of illegal appearance was presented in the briefs, citing *People* v. *Steuding, supra,* and *Matter of Bernoff* v. *Amoroso,* 188 Misc. 845, aff'd 271 App. Div. 925, 65

N. Y. S. 2d 810, aff'd 67 N. Y. S. 2d 701. Confirmation of the fact that these cases were urged below can be found in the official report of this case under "Points of Counsel", 20 N. Y. 2d 277. The issue was also before this Court during its determination of the motion by Appellees to dismiss or affirm. See: Brief Opposing Motion to Dismiss or Affirm submitted by the Appellant. Any denial of equal protection of the laws by a state is illegal conduct under the Fourteenth Amendment of the United States Constitution.

The difficulties of solving cases of wrongdoing by public officers envisioned by the hypothetical cases on page 18 of Appellees' Brief are no more severe than solving cases of wrongdoing on the part of any other person in our society. The privilege against self-incrimination belongs to all citizens and the fact that one of them is a public officer does not make any more difficult the solving of crime. The answer is not in weakening constitutional liberty but is in strengthening the skill, efficiency and techniques in the gathering of extrinsic evidence. Nor is the need for discipline particularly weakened by the privilege. Even the Armed Forces of the United States recognize that the need for extreme discipline involving the security of the nation can co-exist compatibly with constitutional liberties including the privilege against self-incrimination. See; *Uniform Code of Military Justice,* Article 31.

CONCLUSION

The state requirements of continued public office are unconstitutional and the Appellant should be restored, as he has never been found guilty of any justiciable act of misconduct.

Respectfully submitted,

RONALD PODOLSKY
Attorney for Appellant

April, 1968